Supreme Court, U.S.
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No. 91-1715

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

SEA-LAND SERVICES, INC.,

*Petitioner*,

—v.—

JOHN FANOLI and MOLLI FANOLI, his wife,

*Respondents*.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEW JERSEY

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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## ARGUMENT

Petitioner seeks a determination whether an employee covered by the Longshore and Harbor Workers' Compensation Act (33 U.S.C., Section 901-950) who is not a longshoreman can sue an employer who is also the owner of a "vessel" aboard which or while working in connection with which (33 U.S.C., Section 902(21)) injury is sustained caused by vessel negligence (33 U.S.C., Section 905(b)).

Respondents claim that their right to sue is established by virtue of the first sentence of Section 905(b) despite provision in that sentence that suit be brought against the vessel ". . . as a third party in accordance with the provisions of [Long-shore Act] Section 933. . .". This statutory requirement, according to respondents, is ". . . akin to the literary device of simile. . ." (Brief in Opposition, age 6); and, as a result, must be read as meaning *either* an actual third party, i.e., a vessel which is *not* the employer's employer *or* " 'as if it were a third party' " (*Ibid.*) and, hence, as *absolutely meaningless*. Respondents call this supposed analysis "statutory interpretation". This argument solves only half their problem. What remains to be explained is *why* Congress—having allegedly provided for suit by any covered employee against any vessel whether or not also an employer in the Section 905(b) first sentence—failed in the second Section 905(b) sentence to provide for a "defense" in the event a harbor worker other than a longshoreman (or, as Section 905(b) provided when enacted in 1972, a repairman) should sue his or her employer for injury resulting from vessel negligence.

As respondents interpret the statute, failure to provide such a defense results in the paradox of a shoregang relief cook having a superior right to sue for damages than a directly employed longshoreman. For this reason, respondents offer, in their opposing brief "Counter Statement of the Case" (at page 3), the distraction of "misstatement of fact", as a supposed result of "[p]etitioner[s'] attempts to deny that it had abandoned all efforts to have the trial court charge a potential defense of negligence of fellow employees of respondents".

Because their interpretation is absurd without it, respondents throughout have urged *in this case* the existence of such a "defense". Because the courts are without power to "fill in interstices in the statutory scheme" by creating a "judicially crafted exception" in order to cure an only assumed to be Congressional mistake (See, *Presley v. Healy Tibbits Const. Co.*, 648 F.Supp. 203, 208 (D. Md. 1986)), petitioner *never* argued that such defense existed. The trial court acknowledged that it did not "really see . . . [such a defense in a harbor worker's suit] . . . in the statute either" and "ruled" it did not exist—but understandably was "confused" because petitioner did not "want to resort to that defense, and . . . [respondents' counsel] . . . is agreeable to having it submitted to the jury", whereas it ". . . would think the arguments would go the other way"[1]. By offering this distraction, respondents avoid confronting the fact that had Congress in 1972 intended Longshore Act employers other than longshoremen and ship builders and repairman be entitled to sue their employers, it would have provided such a defense; and its "failure" to do so is not a mistake, but, instead, is conclusive proof that all other covered employees were *not* given the right to sue a vessel-employer.

That this is so is, of course, reflected in respondents' effort to explain why the "defense" provided in the second Section 905(b) sentence exists in a longshoreman's case—to exclude liability of the vessel on account of one longshoreman's negligence resulting in injury to another with resulting possibility of "abuse and collusion" (Brief, pages 9-10). Respondents' argument tacitly assumes that the Act's Section 902(21) "vessel" definition, which includes ". . . said vessel's owner . . .", *would* establish liability to a longshoremen for the negligent acts of others employed by the vessel to provide stevedoring services were it not for the second Section 905(b) sentence provision otherwise. But if this is so, acts of another shoregang member would similarly potentially create liability; and it is not to be presumed that *only* longshoremen are capa-

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1 Quotations are from discussions, which appear at pages 985-987 of the trial transcript. They are reproduced as an additional Appendix to this Brief.

ble of "abuse and collusion". Moreover, the correct interpretation of the second Section 905(b) sentence was described by this Court in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266 (1979). It "means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself". As a result, it has nothing at all to do with this case, which involves neither a longshoreman's injury nor stevedore negligence. For this reason, claim that it is "disingenuous to believe that Congress intended to create a right to sue in this [second Section 905(b)] sentence" (Brief, page 6), makes no sense because no covered employee could sue his or her vessel employer, i.e., non-third party vessel, without it.

Unquestionably, however, the second Section 905(b) sentence *seems* to create a defense rather than to authorize suit; and it is the awkwardness of the *inapplicable* second sentence which has created the problem. It is not sufficient for the courts to rely upon assumption, rather than upon analysis of what by the rules of statutory construction the statute must be held to actually mean. It is clear that respondents cannot sue petitioner *unless* this Court should agree that reading all meaning out of the phrase "as a third party in accordance with . . . Section 933. . ."—on the basis that it is "akin to the literary device of simile"—*is* the proper basis upon which to construe this Act of Congress. The issue is important, despite respondents' claim to the contrary.

In *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2nd Cir. 1979), it was assumed that the first sentence of Section 905(b) provided for suit for vessel negligence against an employer by the wife of a deceased scuba diver; that it made no difference whether the negligence was that of the vessel in connection with which the employee was working or some other; or whether employer negligence occurred at sea or on land. In that court's view, all that need be established is negligence of a co-employee working in a different capacity caus-

ing or contributing to injury and death, since Section 905(b) established liability for negligent acts as an *employer*. In *Smith*, employer negligence—of the president of defendant's corporation—resulted in a finding of Section 905(b) liability. In *Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528, 532 (5th Cir. 1991) it was held on a purely arbitrary basis that alleged negligent acts, not by the actual employer, but by the accident victim's co-employees—the master and crew of a vessel—were "best characterized as acts of the employer" for which no liability existed by reason of the barring effect of Longshore Act Section 905(a). In neither *Smith* nor *Levene* did the vessel challenge plaintiff's right to sue, and in the former liability was established for acts of the employer as opposed to acts as a "vessel"; while in the latter acts of all but identical character *by those in charge of a vessel* were found to be no basis for imposing liability. How can a court charge a jury as to how to decide the supposed critical liability issue of what acts are "best characterized as acts of the employer" as opposed to of a Section 905(b) vessel, in the event negligence of a master and crew are *not* to be "best characterized" as vessel negligence, and, instead, as negligence as an employer?

Respondents' ultimate argument, for ". . . a final possibility that could exist if petitioner's position was correct . . ." (Brief, page 10) shows best why the issue is important. It is said in this case in which *because* respondent did not sue under the Jones Act and thus did not claim that he had been employed as a "master or member of the crew of any vessel" barred from status as a Longshore Act covered "employer" by virtue of 33 U.S.C., Section 902(3)(G), suggests somehow that he was "harmed". Yet, respondents also advise this Court that because Longshore Act compensation is "relatively generous" and benefits received until the time of judgment must be repaid means that the obvious error in this case should be ignored for reasons of unimportance—"petitioner cannot show that there has been as a result a measurable increase in litigation" (Brief, page 2); and suits of this kind will not recur because: "[i]t would indeed be a rare instance when an action at law would even be economically viable" (*Ibid.* page 10). This is the attorney's argu-

ment in plead for a fee dispute their being the *source* of alleged "harm" to respondents.

Longshore Act benefits for permanent total disability are payable for life (33 U.S.C., Section 908(a) ". . . during the continuance of total disability"); and they are subject to annual increase (33 U.S.C., Section 910(f)) after determination of permanent, total disability, which John Fanoli has *not* sought despite his age (60 when hurt) and the nature of his injuries ("exploded" acetabulum requiring hip replacement which must be repeated, very severe shoulder dislocation). His $900,000 jury verdict must be divided on the basis described in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980) and, as a result, compensation payments at the time of judgment are deducted *after* payment of the attorney's percentage fee. Assuming a 1/3 fee and benefits to date of approximately $220,000 (respondent is compensated at an annual rate in excess of $19,000 and as of August 1, 1990 had received benefits totalling $181,368.34), his net recovery after deduction of litigation expense and interest might be $350,000. During his lifetime, John Fanoli will be entitled to so-called deficiency compensation by virtue of 33 U.S.C., Section 933(f), since his net recovery will be spent on his upkeep in the future while his compensation benefits are merely suspended. This Court in *McDermott International, Inc. v. Wilander*, 498 U.S. ____, 111 S.Ct. 807 (1991) did *not* say as alleged that respondent "would be classified as a seaman" but, instead, held that arbitrary approaches to making this determination are not proper; and that a decision awarding benefits by the Deputy Commissioner, United States Department of Labor, could have controlling effect on the question of Jones Act status.

A Longshore Act employer can protect itself from simultaneous claim of entitlement to benefits and suit under the Jones Act by either contesting Longshore Act coverage before the Department of Labor or the applicability of the Jones Act in court. Permitting all covered employees who are not longshoremen to sue under Section 905(b) allows, not a double recovery, but the employee to have either compensation or

damages whichever is higher whenever injury occurs by reason of co-employee negligence. When the attorney's fee is 33 $^{1}/_{3}$%, recovery of damages in which the injured employee has an interest depends upon the verdict being half-again more than the amount of benefits paid at the time of satisfaction of judgment. On account of the fact that statutory benefits *are* so generous, Section 905(b) suits often result in recovery only by the employee's attorney, a fact which was true even before 1972 when maximum weekly compensation benefits were one-tenth what they are today. See, *Bloomer*, *supra*, 445 U.S. at 83-85. Longshore Act 33 U.S.C., Section 908(i) provides for a lump sum settlement of a compensation claim for benefits on account of permanent total disability, but not, of course, for payment of the claimant's attorney fee on the basis of a percentage provided in a contingent fee retainer agreement. The Act's Section 933(f) provides for resumption of payment of compensation following satisfaction of a judgment for damages after the employee's *net* recovery equals the amount of benefits which he would have received had no suit been brought.

It was in order to "earn" a fee on a contingent fee basis that this suit was brought. When the Jones Act is not claimed and, instead, Longshore Act benefits are paid—because in the circumstance of this case the Deputy Commissioner would have properly found that they were owed—suit under Section 905(b) proceeds free of all risk to the employee and for this reason it should be expected that such suits will be brought whatever the possibility of additional long-term recovery by the employee as opposed to recovery of a fee by his or her attorney. This court should *again* hold, in order to make the law applicable in suits under Section 905(b) reflective of "reason", "common sense" and the "purpose of Congress", that the second sentence of Section 905(b) is nothing *other than* a special provision for longshoremen and independent contractor employers of longshoremen which is entirely unrelated to *any other* Longshore Act case issue.

## CONCLUSION

Writ of certiorari should be granted.

DATED: Newark, New Jersey
June 22, 1992

Respectfully submitted,

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# APPENDIX

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—UNION COUNTY
DOCKET NO. L-082810-87

JOHN FANOLI AND MOLLIE FANOLI, his wife,

*Plaintiffs,*

—VS.—

SEA-LAND SERVICES, INC, ET AL,

*Defendants.*

TRIAL TRANSCRIPT

Union County Courthouse
Elizabeth, New Jersey,
June 15, 1990.

BEFORE:

HON. A. DONALD MC KENZIE, J.S.C., & JURY

APPEARANCES:

JOSEPH A. GINARTE, ESQS.
BY: RICHARD M. WINOGRAD, ESQ.
Attorneys for the Plaintiffs

KENNY, STEARNS & BRODERICK, ESQS.
BY: JOSEPH T. STEARNS, ESQ.
Attorneys for the Defendants

TRANSCRIPT ORDERED BY:

KENNY, STEARNS, & BRODERICK, ESQS.

B. PETER SLUSAREK, C.S.R., XI00291
Official Court Reporter

[985] MR. WINOGRAD: Stevedoring services, and so on.

THE COURT: All right.

MR. WINOGRAD: Anything dealing with what his status was is now not part of the case.

THE COURT: I have not made that ruling yet. I may well make it after the verdict, or it can be the subject of a motion for judgment NOV if indeed the verdict is in favor of the plaintiff.

MR. WINOGRAD: You already did rule that he wasn't hired to perform stevedoring services.

THE COURT: Correct.

MR. WINOGRAD: So that is out.

THE COURT: What about this principle that the defendant wants to put forward that if the plaintiff was injured by the negligence of a co-worker performing the same kind of services that he is not entitled to recover?

MR. WINOGRAD: If it's the sole negligence of the—yes, I would agree with that one. I think that that's basically the fellow servant doctrine, and that it certainly bolsters my argument from yesterday that he is in no better or worse position than anybody else. And that was what the whole purpose of the '72 amendments was, to not endow him with any special maritime cause of action but just put him where everybody else is.

THE COURT: You are rising. You just won the [986] point without being heard, Mr. Stearns. He concedes.

MR. STEARNS: He doesn't concede, and I don't concede either. And I have not raised the argument of fellow servant, negligence of somebody in the same capacity. This was discussed yesterday.

THE COURT: I misunderstood then.

MR. STEARNS: Yesterday I said to the Court that there is, this is a matter of statute, it's a finding process on the legal issue of an exception to the general bar under section 905. The exception exists with respect to longshoremen, subject to a

defense available to the vessel, that the injury was caused by the negligence of another person hired by the vessel.

THE COURT: You don't want that defense, then?

MR. STEARNS: That's exactly—I do not see it in the statute.

THE COURT: I don't really see it in the statute either. I am confused now. You are indicating you don't want to resort to that defense, and Mr. Winograd is agreeable to having it submitted to the jury.

MR. STEARNS: Yes. Of course. It proves certain points that I believe I have made, as best as I can at least.

THE COURT: Your objection—Fine. I am not going to—Let's move on.

I am making my ruling. I agree with you.

[987] MR. STEARNS: Yes, thank you. What I am saying now, just if I may be given just the courtesy.

THE COURT: No, sir. I have made—I am sorry Mr. Stearns. I told you I am going to have to cut you off.

The statute only provides for that issue to go to the jury where it's a stevedore, a longshoremen injured by another longshoremen, basically.

MR. WINOGRAD: Statute does provide that. But I cited a case that interpreted it.

Number twenty I object to. A defendant had no obligation to warn plaintiff of any dangers which plaintiff himself would have perceived and avoided.

THE COURT: Excuse me. Before we get to that. I am still confused. Why are you urging—and it must—I must be missing something, because you are arguing about it, and I would think the arguments would go the other way. Why do you want me to tell the jury that the plaintiff is not entitled to recover if, for example, another member of the shore gang caused his fall by the negligence of that employee?

MR. WINOGRAD: Perhaps I shouldn't have said anything more. If Mr. Stearns isn't pushing the point, then I don't want it. But if he was, I don't want, I want the case to stand up on appeal. That's the only reason. If he was. But he is not. So it wouldn't matter.